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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,
v.
HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

RICHARD P. WARD
STEPHEN B. PERLMAN
ELEANOR D. ACHESON
JOHN H. MASON
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
JOHN REINSTEIN
MASSACHUSETTS CIVIL LIBERTIES UNION FOUNDATION
68 Devonshire Street
Boston, Massachusetts 02109
(617) 742-8040
Attorneys for the Appellee

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Pursuant to Rule 16 of the Rules of this Court, Helen B. Feeney moves that the judgment of the United States District Court for the District of Massachusetts be affirmed.

Question Presented.

Does Mass. Gen. Laws c. 31, § 23, which bars women from civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

Statement.

This is a direct appeal under 28 U.S.C. § 1253 from the final judgment and order of a three-judge district court in the United States District Court for the District of Massachusetts holding that Massachusetts' absolute preference of veterans for civil service employment violates the Equal Protection Clause of the Fourteenth Amendment and enjoining the enforcement of Mass. Gen. Laws c. 31, § 23 (1971).

The action in the district court was brought under 42 U.S.C. § 1983 by Helen B. Feeney, the appellee here, against the Commonwealth of Massachusetts, its Division of Civil Service, the Director of Civil Service and the members of the Massachusetts Civil Service Commission.[1] The plaintiff, who had been excluded from consideration for numerous civil service positions as a result of the use of the absolute veterans' preference formula, alleged that the statutory scheme by granting an absolute preference to a class which was almost exclusively male discriminated against women.

[1] The state position of Director of Civil Service has been eliminated and the duties transferred to the position of Personnel Administrator of the Commonwealth of Massachusetts, which position is presently held by Wallace Kountze. The current members of the Civil Service Commission are Amelia W. Miclette, Wayne A. Budd, John F. Donegan, Ruth M. MacRobert and Richard H. Linden.

The plaintiff's action was consolidated with a previously filed action challenging the same statutory scheme. The parties submitted a lengthy statement of facts in each case describing in detail the Massachusetts civil service system and the operation of the veterans' preference statute within that system, the number of men and women employed in civil service positions in Massachusetts and the restrictions on service in the armed forces by women. The district court also considered the affidavit of the plaintiff, describing her efforts over the years to obtain appointment to various civil service positions, and the affidavit of Edward W. Powers, a former Director of Civil Service and a named defendant, in which he conceded that the veterans' preference statute drastically restricts employment opportunities for women in Massachusetts' civil service.

On March 29, 1976, the district court entered an order and opinion awarding judgment in favor of plaintiff Feeney against the named individual defendants.[2] The opinion is reported as *Anthony* v. *Commonwealth of Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) ("*Anthony*"). The district court, after carefully reviewing the facts, concluded that the veterans' preference formula, given the virtual exclusion of women from the armed forces, "inescapably" leads to the denial to women of any meaningful opportunity to compete for civil service jobs and held that the statute was unconstitutional.

On August 23, 1976, the Attorney General docketed an appeal (No. 76-265) in this Court on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission. This Court certified to the Supreme Judicial Court of Massachusetts a question relating to the authority of the Attorney General to pros-

[2] The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the grounds that they were not "persons" within the meaning of 42 U.S.C. § 1983.

ecute the appeal. 429 U.S. 66 (1976). After receipt of the state court's response, dated September 16, 1977, and unofficially reported at 366 N.E.2d 1262 (1977), this Court remanded the cause to the district court for further consideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976). The order of remand is reported at 434 U.S. 884 (1977).

On remand, the district court ordered the parties to file supplementary briefs addressed to the specific question raised by this Court's order of remand and heard oral argument addressed to that question. Upon reconsideration of the entire record, including the legislative and administrative history of the veterans' preference statute and the Commonwealth's past restriction of employment opportunities for women, the district court, on May 3, 1978, reaffirmed its original judgment in favor of Helen B. Feeney and again permanently enjoined the individual defendants from utilizing Mass. Gen. Laws c. 31, § 23 (1971), in filling civil service positions. In its second opinion, reported as *Feeney* v. *Commonwealth of Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978) ("*Feeney*"), the district court, following the remand order of this Court, reviewed and analyzed the totality of relevant facts and concluded that there was a discriminatory intent to disadvantage women by the adoption and use of an absolute and permanent preference formula.

Despite the factual finding of a purposeful discrimination against women, the Attorney General again docketed an appeal in this Court on August 10, 1978, on behalf of the Personnel Administrator of the Commonwealth of Massachusetts and the members of the Civil Service Commission.

Argument.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

I. *The District Court Correctly Found that the Exclusion of Women from Civil Service Positions was Intentional and Purposeful.*

Consistent with the remand order of this Court and the decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), the district court fully analyzed the "totality of the relevant facts," 451 F. Supp. at 147, to determine whether the discrimination against women caused by adoption and use of an absolute and permanent preference formula was intentional and purposeful. The district court's conclusion was that the Commonwealth of Massachusetts had ". . . intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans . . .." *Feeney*, 451 F. Supp. at 150. In reaching this conclusion, the district court correctly and properly considered the presence of several factors upon which a finding of a purposeful discrimination appropriately may be based.[3]

[3] The appellants erroneously suggest that there must be a finding "that the statute was motivated by an anti-female animus." Jurisdictional Statement, p. 16. Subjective ill-will toward a particular class is not required by *Davis*. Rather, all that is required is a showing that the discrimination is deliberate and purposeful as opposed to incidental or accidental. *See* Castaneda v. Partida, 430 U.S. 482, 494 n. 13 (1977). A requirement of subjective ill-will toward women is particularly inappropriate in cases involving sex discrimination which is more often the product of "paternalistic stereotyping," Regents of University of California v. Bakke, ___ U.S. ___, 98 S. Ct. 2733, 2784 (1978) (opinion of Brennan, J.), or a "traditional way of thinking about females," Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring), or "the socialization process of a male-dominated culture." Kahn v. Shevin, 416 U.S. 351, 353 (1974).

A. The Devastating Impact on Women's Employment Opportunities.

Although the district court did not base its finding of intentional discrimination solely on the disproportionate impact on the employment opportunities of women, it did consider the disproportionate impact on women to be "highly relevant" to the issue of intentional discrimination. *Feeney*, 451 F. Supp. at 146. This was clearly consistent with this Court's opinion in *Washington* v. *Davis*, *supra*, 426 U.S. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

The district court found that the use of the absolute preference formula inescapably caused a "devastating impact" on the employment opportunities of women. *Feeney*, 451 F. Supp. at 149. Without regard to demonstrable individual qualifications, women as a class are effectively barred from all but low-paying jobs shunned by men. "Few, if any, females have ever been considered for the higher positions in the state Civil Service." *Anthony*, 415 F. Supp. at 498.

Thus, the use of an absolute preference guarantees the perpetuation in Massachusetts of decades of discrimination against women. *See Frontiero* v. *Richardson*, 411 U.S. 677, 684-685 (1973). It operates to make "upper level state employment a male preserve," *Feeney*, 451 F. Supp. at 151 (Campbell, J., concurring), while "female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied." *Anthony*, 415 F. Supp. at 498.

The absolute preference formula causes a "near blanket, permanent exclusion of all women from a major sector of employment." *Anthony*, 415 F. Supp. at 501 (Campbell, J., concurring). Such a devastating and destructive impact on women's employment opportunities in itself provides a proper inference of purposeful discrimination. *See Castaneda* v. *Partida*, 430 U.S. 482, 494 n. 13 (1977) ("If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."); *cf. NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 33-34 (1967).

The district court also found "a clear pattern of exclusion of women from competitive civil service positions." *Feeney*, 451 F. Supp. at 149. This type of systematic adverse exclusion of an identifiable class is expressly recognized by this Court as an appropriate basis from which to infer intentional discrimination. *Washington* v. *Davis*, *supra*, 426 U.S. at 241 ("It is also clear . . . that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.'"); *Akins* v. *Texas*, 325 U.S. 398, 403-404 (1945) ("A purpose to discriminate must be present which may be proven by systematic exclusion . . .."); *see also Snowden* v. *Hughes*, 321 U.S. 1, 9 (1944); *Eubanks* v. *Louisiana*, 356 U.S. 584, 587 (1958); *Sangmeister* v. *Woodard*, 565 F. 2d 460, 467 (7th Cir. 1977), *appeal dismissed and cert. denied sub nom. Illinois State Board of Elections* v. *Sangmeister*, ____ U.S. ____, 98 S. Ct. 1516 (1978).

Thus, the overwhelming and unrebutted evidence of a "devastating" impact on the employment opportunities of women, as well as the "clear pattern of exclusion of women," provided a strong inference of purposeful and intentional discrimination. However, the district court did not base its conclusion of intentional discrimination solely on these disastrous effects on women. Rather, it appropriately considered other relevant factors that evidenced intent.

B. The Non-Neutral Selection Procedure.

Again, following this Court's direction, the district court analyzed whether the selection procedures embodied in the absolute preference formula were neutral with respect to gender. *Washington* v. *Davis*, *supra*, 426 U.S. at 241 (exclusion of a class plus the use of "non-neutral selection procedures" is sufficient to establish a prima facie case of discriminatory purpose).

The district court found that the "selection formula, geared as it is to veteran status, is necessarily controlled by federal military proscriptions limiting the eligibility of women for participation in the military." *Feeney*, 451 F. Supp. at 145. This lack of neutrality with respect to gender that is inherent in the absolute preference formula appropriately reinforces the conclusion that the discrimination is purposeful. As Judge Campbell observed with respect to the veterans' preference law:

> "Thus its 'neutrality' is at best skin-deep. The law was sexually skewed from the outset, since the exclusionary effect upon women was not merely predictable but absolutely inescapable and 'built-in'."

Feeney, 451 F. Supp. at 151 (Campbell, J., concurring).

In stark contrast to the racially neutral selection procedures in *Davis*, which were found not to be "culturally slanted to favor whites," 426 U.S. at 235, the district court found that the absolute nature of the preference rendered qualifications secondary and produced "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women." *Anthony*, 415 F. Supp. at 495. Unlike the test in *Davis*, which was "designed to serve neutral

ends," 426 U.S. at 248, the absolute veterans' preference is "a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group . . . at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women." *Anthony*, 415 F. Supp. at 496.[4]

Since the selection criterion is premised on veteran status, a status which women have been intentionally denied through no fault of their own, it is not neutral with respect to gender. The legislature's deliberate choice of an inherently non-neutral selection criterion for civil service positions provides the fair inference that the legislature intended the discriminatory consequences upon the employment opportunities of women.

C. The Inevitability of the Exclusionary Impact on Women.

In addition to the lack of neutrality with respect to gender that is built into the system of absolute preference, the district court also analyzed whether the "official acts or policies" of the defendants "had the natural, foreseeable and inevitable effect of producing a discriminatory impact." *Feeney*, 451 F. Supp. at 147.

Davis makes clear that state officials are not to be held responsible for every incidental and unintended effect of a statute. However, state officials must still be held responsible for the foreseeable and inevitable consequences of their deliberate choices. The basic and familiar principle that an actor intends, and must be held responsible for, consequences which he knew, or should have known, were substantially certain to occur as a result of his actions has long been recognized as an appropriate basis upon which to find an intentional or purposeful discrimination. *See Washington* v. *Davis*, *supra*, 426 U.S. at 253 (Stevens, J., concurring); *cf. Keyes* v. *School Dis-*

[4] It is this built-in lack of neutrality which occasioned Judge Tauro's note that the statute is not even facially neutral. *Feeney*, 451 F. Supp. at 147 n. 7.

trict No. 1, Denver, Colo., 413 U.S. 189 (1973); *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). Following *Washington* v. *Davis, supra*, the various courts of appeal have reaffirmed the basic principle that intent may be inferred from proof of the foreseeable effects of wilful actions. For example, in *United States* v. *School District of Omaha*, 565 F. 2d 127 (8th Cir. 1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 1240 (1978), the court, after remand by this Court, reaffirmed its holding of intentional segregation "because the natural and foreseeable consequence of the acts of the School District was to create and maintain segregation . . .." *Id.* at 128. *See also Arthur* v. *Nyquist*, 573 F. 2d 134, 142-143 (2d Cir. 1978), and *United States* v. *Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977).

In this case, the district court had before it and fully analyzed the legislative and administrative history relating to the absolute preference and civil service selection procedures. *Feeney*, 451 F. Supp. at 148 n. 9. The district court found that the legislative history suggested an awareness of the predictable and inevitable impact on women. *Ibid.* It found also that for 85 years Massachusetts had engaged in deliberate *de jure* discrimination by separately requisitioning for "female" jobs which were "exempt" from application of the preference and that this "exemption operated only to preserve stereotypically 'female' clerical jobs for women." *Feeney*, 451 F. Supp. at 148 n. 9. This long history of *de jure* discriminatory hiring policies, coupled with the legislature's awareness of the inevitable exclusionary impact on women that resulted from applying the absolute preference to all positions, was enough for the district court properly to infer that the consequent exclusion of women was purposeful and intentional. *Cf. Keyes* v. *School District No. 1, Denver, Colo., supra*, 413 U.S. at 207-208.

Thus, in addition to considering the devastating exclusionary impact of the absolute preference formula upon women, the district court analyzed the legislative and administrative history of the adoption and use of the absolute preference. The district court found that, with awareness of its discriminatory consequences to women, the legislature deliberately chose to adopt a non-neutral selection criterion which was so absolute that it would, not just foreseeably but inevitably, exclude women from consideration for upper-level civil service positions. It found that the state had for 85 years engaged in a clear pattern of exclusion of women and, by use of separate requisitions for women, engaged in *de jure* gender-based discrimination which kept women in stereotypically "female" jobs. Based on these factors and others,[5] the district court properly concluded that the state's adoption and use of an absolute preference formula constituted an intentional and deliberate discrimination against women.

II. *The District Court Correctly Applied the Standard of Judicial Scrutiny Appropriate for Review of a Statute that Discriminates Against Women.*

Having concluded that the adoption and use of the absolute veterans' preference formula constituted an intentional and purposeful discrimination against women, the district court properly employed the standard of judicial scrutiny originally

[5] The principal grounds upon which the district court based its finding of purposeful discrimination are set forth above. The court also found probative the fact that the legislature enacted a civil service selection process that "bears no relationship to job performance." *Feeney*, 451 F. Supp. at 148. In addition, it noted that the legislature ignored less drastic alternatives to achieve its purposes, which alternatives would not have caused the systematic exclusion of women from upper-level civil service positions. *Feeney*, 451 F. Supp. at 150. *See* United States v. Board of School Commissioners of the City of Indianapolis, 573 F. 2d 400, 413 (7th Cir. 1978).

formulated in *Reed* v. *Reed*, 404 U.S. 71 (1971), and consistently applied by this Court in cases involving gender-based discrimination. *Anthony*, 415 F. Supp. at 495. *See Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Califano* v. *Webster*, 430 U.S. 313 (1977).

This heightened level of scrutiny requires that classifications by gender, in order to withstand constitutional challenge, "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, *supra*, 429 U.S. at 197. This standard of review is triggered by (1) the finding of a gender-based classification[6] that adversely affects women and (2) a determination that the classification is premised upon or fosters "'old notions' of role typing," *Craig* v. *Boren*, *supra*, 429 U.S. at 198, or "archaic and overbroad generalizations," *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975), about the role of women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'." *Craig* v. *Boren*, *supra*, 429 U.S. at 198-199.

The reason that the Court looks more closely at gender-based classifications which result from a "traditional way of thinking about females," *Califano* v. *Webster*, *supra*, 430 U.S. at 320, is because they "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 687. The old generalizations about women are simply no longer

[6] The gender-based nature of the classification need not "be express or appear on the face of the statute." *Washington* v. *Davis*, *supra*, 426 U.S. at 241.

consistent "with contemporary reality." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 207.

The absolute veterans' preference formula, originally enacted in the 19th century,[7] continues to foster "old notions" that women should be in the home rather than applying for responsible upper-level positions in state government and that those women who do work should be relegated to lower-level, less responsible positions. The "paternalistic stereotyping" upon which the absolute veterans' preference formula is premised has the effect of "stigmatizing all women with a badge of inferiority." *Regents of University of California* v. *Bakke*, ____ U.S. ____, 98 S. Ct. 2733, 2784 (1978) (separate opinion of Brennan, J.).

In addition, the absolute preference formula excludes women from significant civil service positions "because of circumstances totally beyond their control," *Anthony*, 415 F. Supp. at 499, and without regard to the individual qualifications of female applicants. *Anthony*, 415 F. Supp. at 498-499. The system of absolute preference "makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males." *Feeney*, 451 F. Supp. at 151 (Campbell, J., concurring). As a result, the district court's use of a heightened level of scrutiny was appropriate. *Cf. Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

In applying the heightened scrutiny appropriate for gender-based classifications, the district court necessarily examined the particular means chosen by the state to achieve its objective. It found the choice of an absolute and permanent preference to be a "broad-brush approach" based on "mere administrative convenience." *Feeney*, 451 F. Supp. at 145. The

[7] "[A] discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 223 (Stevens, J., concurring).

district court found a total absence of any attempt to tailor the statute carefully to the purposes sought to be achieved.[8] Noting that "Massachusetts has considerable flexibility in the manner in which it can aid its veterans," *Anthony*, 415 F. Supp. at 499, the district court found that the state had numerous effective alternatives by which it could achieve the very same purpose of aiding veterans but "without doing so at the absolute and permanent expense of its women." *Ibid.* Finding no rational or legitimate reason for the adoption of an absolute and permanent preference, the district court properly concluded that the statute was unconstitutional.[9]

[8] For example, the district court found "[n]o time limit was imposed or attempt made 'to tailor its use to those who have shortly returned to civilian life.'" *Feeney*, 451 F. Supp. at 145, quoting *Anthony*, 415 F. Supp. at 499.

[9] "We determined that the means chosen by the Massachusetts Legislature to reward veterans were not grounded 'on a convincing factual rationale.'" *Feeney*, 451 F. Supp. at 145.

Conclusion.

For the reasons stated herein and by the district court, the judgment of the district court should be affirmed.

Respectfully submitted,

RICHARD P. WARD
STEPHEN B. PERLMAN
ELEANOR D. ACHESON
JOHN H. MASON
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

JOHN REINSTEIN
MASSACHUSETTS CIVIL LIBERTIES
UNION FOUNDATION
68 Devonshire Street
Boston, Massachusetts 02109
(617) 742-8040
Attorneys for the Appellee